Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1608

* * * *

JAMES F. WARDELL,

Petitioner

v.

THE STATE OF TEXAS,

Respondent

* * * *

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS FOR THE STATE OF TEXAS

* * * *

RESPONDENT'S BRIEF IN OPPOSITION

* * * *

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Attorney General of Texas, on behalf of the State of Texas, respectfully requests that the Court deny the petition for writ of certiorari.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals, not yet reported, appears in the Appendix of Petitioner's Petition for Writ of Certiorari. No opinion was rendered by the District Court for the 108th Judicial District

Court, Potter County, Texas.

JURISDICTION

Pititioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3).

QUESTION PRESENTED

The issue presented to this Court is whether certain evidence introduced in Petitioner's state criminal trial was direct evidence to prove the indictment or evidence of extraneous offenses; and, if it is considered the latter, whether the trial court's failure to provide limiting instructions rendered the trial so fundamentally unfair that Petitioner was denied due process of law.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner relies upon the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Petitioner, James Wardell, was indicted by the Potter County Grand Jury in a six count felony indictment in Cause Number 15,921 in the 108th Judicial District Court of Potter County. Also named in the indictment as co-defendants were Robert Wilkinson, Gene Welna, and Arward Smith.

On February 10, 1975, the case was called to trial and the State elected to proceed on count two of the indictment which alleged in part that the named defendants on or about February 10, 1972, stole from the Amarillo Air Force Credit Union an unknown quantity of Amarex stock and 200 shares of Liquidonics stock. Petitioner and co-defendant Smith were tried jointly and each entered pleas of not guilty before the jury.

The jury found Petitioner and co-defendant Smith guilty as charged. Petitioner's punishment was set at seven and one-half years confinement in the Texas Department of Corrections. Petitioner's conviction was affirmed by the Texas Court of Criminal Appeals, and this writ petition followed.

During this complex, white-collar crime case, the State introduced evidence which showed that in 1972 Petitioner and co-defendant Smith were involved in a series of appropriations wherein valuable Amarex and Liquidonics stock were taken from the Amarillo Air Force Credit Union and replaced with worthless or near worthless stocks and bonds--in essence, that a large theft had occurred.

Robert Wilkinson had a $401,000 note from the Credit Union and as security for this note he had on pledge with the Credit Union a large amount of Amarex stock certificates and 200 shares of Liquidonics certificates. On or about February 10, 1972, Petitioner, co-defendant Smith, and Robert Wilkinson arranged for Petitioner to assume and take over Wilkinson's $401,000 indebtedness. Wilkinson was completely released from this indebtedness and much of his Amarex stock and Liquidonics stock originally pledged as collateral was returned to him. As collateral for the Wilkinson indebtedness, Petitioner pledged shares of International Airlines and Water Wagon, Inc., stock, plus cash. Also, ten thousand shares of Amarex stock remained as collateral for the loan (St. Ex. 5a,5b, and 6b).

On October 2, 1972, Petitioner substituted Nineteen Corporation bonds for the ten thousand shares of Amarex stock that had been left at the Credit Union as collateral on the February 10th assumption transaction (S/F p. 1357-58).

The State showed that on October 27, 1972, Petitioner assumed two notes for Clifford Bobbitt totalling one hundred sixty thousand dollars (S/F p. 1552). Like the Wilkinson note, the Bobbitt note had Amarex stock as collateral. Nine thousand, six hundred or nine thousand, seven hundred of these shares were removed by Petitioner and Nineteen Corporation bonds were substituted as collateral (S/F p. 1552-54).

The State offered evidence to show that the stocks and bonds which had been substituted for the Amarex and Liquidonics stock as collateral at the Credit Union during this series of transactions were worthless (S/F p. 523; 1914). Petitioner did not testify but offered some evidence that the collateral he substituted did have some value. (S/F p. 2722, Wardell Ex. 7).

REASONS FOR DENYING THE WRIT

1. THIS CASE IS NOT WORTHY OF THE COURT'S ATTENTION BECAUSE IT INVOLVES ONLY A NARROW QUERTION OF STATE CRIMINAL LAW AND PROCEDURE THAT DOES NOT IMPLICATE THE UNITED STATES CONSTITUTION.

Petitioner contends that the transactions which occurred on October 2, 1972, and October 27, 1972, were extraneous to the offense charged in the indictment. As such, Petitioner contends that it was improper for the trial court to admit evidence of these transactions without limiting instructions to the jury on the limited purposes for which such evidence could be used. Apparently, Petitioner contends that this alleged impropriety was so egregious that the trial was rendered fundamentally unfair, thereby denying Petitioner due process of law.

Petitioner was charged with theft of Amarex and Liquidonics stock from the Amarillo Air Force Credit Union on or about February 10, 1972, in an assumption agreement whereby collateral was substituted at the Credit Union for shares of Amarex and Liquidonics stock. As part of its proof on this charge, the State proved that on October 2 and October 27, 1972, Petitioner withdrew Amarex stock and substituted Nineteen Corporation bonds as collateral for the two notes he had assumed.

The State proceeded on Count Two of the indictment which alleges, in part, that on or about February 10, 1972, and anterior to the presentment of the indictment, the Petitioner (with others) stole a quantity of shares of Amarex stock and two hundred shares of Liquidonics stock. Paragraph IV of the trial court charge stated that the State was not "bound to prove the exact date alleged in the indictment but may prove the offense, if any, to have been committed at any time prior to the filing of the indictment so long as said offense, if any, occurred within five years of the date of the filing of said indictment." The indictment was returned on October 4, 1973. Therefore, the evidence regarding the October 2nd and October 27th transactions was not offered to show extraneous offenses, but was offered as direct proof of the allegations of theft contained in Count Two of the indictment. That is, the evidence on the October transactions was evidence about a theft which had only *commenced* in February and which was continuing in October. The theft, accomplished through complex legal and financial transactions, was not begun and completed in a single moment of time. It required some duration of time to reach completion.

The Texas Court of Criminal Appeals on direct appeal of Petitioner's conviction confirmed the trial court's assessment of the law, citing both *Ellis v. State*, 318 S.W.2d 655 (Tex.Crim.App. 1958) and *Kirkpatrick v.*

State, 515 S.W.2d 289 (Tex.Crim.App. 1974).

In *Kirkpatrick*, the defendant, a Justice of the Peace, was charged with converting $3.00 from Bexar County on or about October 15, 1970. The evidence showed that between June 22, 1969 and June 21, 1972, the defendant failed to account to the county for a total of $1594.00. The trial court charged the jury that the date alleged in the indictment could mean any date between June 22, 1969 and June 21, 1972. The court rejected the defendant's contention that all the transactions other than the one which occurred on October 15, 1970, were extraneous transactions and that the trial court had erred in failing to give a limiting instruction on the transactions which did not occur on October 15, 1970. The Court held that the transactions between June 22, 1969, and June 21, 1972, were all a part of the State's main case.

Petitioner claims that the *Kirkpatrick* decision is unconstitutional but fails to give any particulars as to how it is so. Further, Petitioner attempts to draw factual distinctions that allegedly differentiate the instant case from the *Kirkpatrick* case.[1]/ The Court of

[1]/ Petitioner attempts to place great significance on the fact that the State elected to proceed against Petitioner only on Count Two of the indictment. Apparently, Petitioner would like to imply that by this election the State made some sort of choice as to which transactions they chose to prosecute him for. However, a review of the indictment shows that all counts of the indictment referred to the same date, "on or about February 10, 1972". Thus, in electing to proceed on only one count, there was no election as to proceeding on only one transaction. Moreover, Petitioner's reliance on the trial court's sustaining his *motion in limine* regarding extraneous offenses is also misplaced. The court determined that the October 2nd and october 27th transactions *were not* extraneous offenses, and that evidence about them was admissible as direct evidence of the charge. Thus, there is no showing that the *motion in limine* was in any way ignored.

Criminal Appeals assessed any possible factual differences and, in citing *Kirkpatrick* as controlling, obviously decided that there were none. Petitioner is now asking this Court on petition for certiorari to review this case for alleged factual distinctions between it and the *Kirkpatrick* case. This Court should not do so, since such distinctions are state law questions only.

The Court of Criminal Appeals noted that Wardell did not claim he did not have notice of what the State intended to prove. Further, it found that jeopardy would attach to all three transactions and that Wardell's rights were thus fully protected. At bottom, Petitioner has raised no substantial claim that his constitutional right to due process of law was violated by the state evidentiary ruling.

2. CASES RELIED UPON BY PETITIONER ARE NOT DISPOSITIVE.

Aside from the fact that the evidence of the October 2nd and October 27th transactions were not introduced as extraneous offenses but as direct evidence, Petitioner's reliance on the many cases cited in his brief is misplaced.[2]/ Petitioner cites cases from several Circuit Courts for the proposition that the Constitution provides that evidence of extraneous offenses is not admissible unless it establishes, among other things, a course of conduct, scheme, design or intent, and then only if limiting instructions are involved. The cases cited for this proposition involve federal criminal prosecutions and are therefore of no value in deciding Petitioner's constitutional claim. The question before this Court is *not* whether the trial court's ruling would

[2]/ Respondent would direct the Court's attention to the fact that Petitioner has cited cases that in no way stand for the proposition cited. See, *Schack v. State of Florida*, 391 F.2d 593 (5th Cir. 1968); *Morton v. United States*, 351 F.2d 457 (10th Cir. 1965).

have led to reversal if Petitioner had been tried in the federal system. Thus, the Circuit Courts' opinions on federal evidentiary questions involved in direct appeals of federal criminal convictions are not dispositive of a state evidentiary matter arising from a state criminal prosecution. Petitioner cites no cases showing that a failure to give limiting instructions when evidence of extraneous offenses was admitted in a state criminal trial resulted in deprivation of due process.

Petitioner relies in part on *Spencer v. State of Texas*, 385 U.S. 554, 87 S.Ct. 648 (1967). In that case, this Court stated its reluctance to dictate rules of criminal procedure, especially in cases such as this one, which do not arise under the supervisory power of this Court over proceedings in lower federal courts, but rather in the form of a constitutional claim.

> "[I]t has never been thought that such cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority."

Spencer, 385 U.S. at 564, 87 S.Ct. at 653. *See also, Green v. Georgia*, 99 S.Ct. 2150 (1979) (Rehnquist, J., dissenting) (lamenting overconstitutionalization of rules of evidence.)

The distinction between *direct appeal* of federal convictions and federal *habeas* review of state convictions has been frequently articulated by the Fifth Circuit. In *Anderson v. Maggio*, 555 F.2d 447 (5th Cir. 1977), that Court, in declining to grant habeas relief to the petitioner, observed:

> "We are not hearing a direct appeal, however, but are deciding the merits of a habeas corpus petition from a state prisoner. To grant such relief, we must find that petitioner's conviction and resulting confinement is unconstitutional. Accordingly, abundant case law indicates that the sufficiency of the evidence introduced during the trial is not a proper matter for a federal court reviewing a petition for habeas corpus, unless the record indicates that the state prisoner was denied due process."

Id., at 452. The same standard would apply where, as here, Petitioner is seeking federal review of his state conviction by way of petition for certiorari on what is essentially an evidentiary matter only.

3. ANY ERROR WOULD BE HARMLESS ERROR.

This Court stated in *Lisenba v. California*, 314 U.S. 219, 228, 62 S.Ct. 280,286 (1941), that it did not sit to review state court action on questions of the propriety of the trial judge's action in the admission of evidence unless the admission of the evidence is such that it results in a violation of due process. Thus, even if it can be said that evidence as to the October 2nd and 27th transactions was evidence as to extraneous offenses, due process has not been offended. If considered to be extraneous, the evidence as to the October transactions is surely relevant to, among others, the matters of intent, motive, opportunity, or absence of mistake. Further, even without limiting instructions as to the use of the evidence, due process would not be violated.

Even if the evidence as to the October 2nd and 27th transactions could remotely be considered as improperly introduced, there is ample evidence in the

record to convict Petitioner without that evidence.[3]/ Thus the introduction of that evidence cannot be said to be so fundamentally unfair as to be a due process violation. In other words, any error would be harmless error beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824 (1967).

CONCLUSION

It is obvious from his petition that Petitioner would like this Court to review the alleged errors of the state trial court as to admissibility of evidence and to substitute its judgment for that of the Texas Court of Criminal Appeals in its application of state evidence rules in a criminal prosecution. Respondent respectfully requests that this Court decline to do so and that it deny the Petition for Certiorari.

Respectfully submitted,

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[3]/ Testimony from both Jane Rouk and Catherine Downing established that on or about the time the February 10, 1972, loan assumption took place, a large number of Amarex stock was withdrawn as collateral from the Amarillo Air Force Credit Union and returned to Wilkinson. (S/F 1001-03; 2793-95).

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